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Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 96-109

In the Matter of

Examination of Current Policy)
Concerning the Treatment of) GC Docket No. 96-55
Confidential Information)
Submitted to the Commission)

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULEMAKING

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TABLE OF CONTENTS

	<u>Para.</u>
I. INTRODUCTION	1
II. BACKGROUND	3
A. <u>Authority to Disclose and Withhold Competitively Sensitive Information</u> .	3
1. <u>Freedom of Information Act</u>	3
2. <u>The Trade Secrets Act and Commission Authority to Disclose Exemption 4 Records</u>	9
B. <u>Review of Commission's Policies Governing Disclosure</u>	17
1. <u>Commission Rules and Procedures</u>	17
2. <u>General Policies Regarding Disclosure of Exemption 4 Records</u> ..	21

3.	<u>The Protective Order Approach</u>	25
III.	ISSUES FOR COMMENT	30
A.	<u>General Issues</u>	30
B.	<u>Model Protective Order</u>	36
C.	<u>Issues That Arise With Respect to Specific Types of FCC Proceedings</u> . . .	38
1.	<u>Title III Licensing proceedings</u>	39
2.	<u>Tariff proceedings</u>	42
3.	<u>Rulemaking proceedings</u>	46
4.	<u>Requests for Special Relief and Waivers</u>	48
5.	<u>Formal Complaints</u>	49
6.	<u>Audits</u>	51
7.	<u>Surveys and Studies.</u>	53
D.	<u>Scope of Materials Not Routinely Available for Public Inspection</u>	54
E.	<u>Proposed Clarifications to Commission Rules</u>	60
IV.	INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS	62
V.	PAPERWORK REDUCTION ACT	70
VI.	PROCEDURAL PROVISIONS	71
VII.	ORDERING CLAUSES	74

I. INTRODUCTION

1. With this Notice of Inquiry and Notice of Proposed Rulemaking, we begin a proceeding to evaluate the Commission's practices and policies concerning the treatment of competitively sensitive information that has been provided to the Commission. Our objective is to develop a policy that will guide us in evaluating an increasing number of requests that the Commission afford confidential treatment to information that has been provided to us by regulated entities and others. The central issue that confronts us is how to avoid unnecessary competitive harm that could be caused by the disclosures of such information and still fulfill our regulatory duties in a manner that is efficient and fair to the parties and members of the public who have an interest in our proceedings. We seek to obtain a broad range of public comment on this question in order to ensure that our policies serve the public interest.

2. We begin by discussing, below, the basic legal framework of the Commission's authority both to withhold and to disclose competitively sensitive information. We follow with a discussion of the Commission's current policies regarding disclosure of confidential data. We next address issues upon which we particularly request comment, including issues relating to particular types of proceedings, such as licensing, tariff, rulemaking, waiver, formal complaint, and audit proceedings. We also seek comment on the development of a "model" protective order that could be used in our proceedings. We seek comment on the scope of information that should not be routinely available for public inspection. Finally, we propose certain clarifying amendments to our confidentiality rules.

II. BACKGROUND

A. Authority to Disclose and Withhold Competitively Sensitive Information

1. Freedom of Information Act

3. Under the Freedom of Information Act (FOIA),¹ the Commission is required to disclose reasonably described agency records requested by any person, unless the records contain information that fits within one or more of the nine exemptions from disclosure provided in the Act.² The public right to examine non-exempt federal agency records is

¹ 5 U.S.C. § 552.

² See 5 U.S.C. § 552(b). The nine exemptions provided by FOIA are for: (i) classified national defense or foreign policy materials; (ii) internal agency rules and practices; (iii) information specifically exempted from disclosure by another statute; (iv) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (v) certain inter-agency and intra-agency memorandums or letters; (vi) personnel, medical and similar files, disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (vii) records compiled for law enforcement purposes; (viii) records of

enforceable in federal district court.³ If a record contains segregable information that is exempt from disclosure, the agency must still release the remainder of the record.⁴ Even when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds.⁵ Affected persons may request, however, that the government protect all or part of certain records containing confidential information from disclosure to other persons.⁶

4. For the purposes of this proceeding, the most important of the FOIA exemptions is commonly referred to Exemption 4. Exemption 4 provides that the government need not disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁷ In the context of the FOIA, a trade secret is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."⁸ The terms "commercial or financial information" are to be given their ordinary meaning for purposes of the FOIA.⁹

financial institutions; and (ix) oil well data. 5 U.S.C. § 552(b); *see also* 47 C.F.R. § 0.457 (types of records not routinely available for public inspection under the FOIA regulations of the Commission).

³ 5 U.S.C. § 552(a)(4)(B).

⁴ 47 U.S.C. § 552(b); *see also* 47 C.F.R. § 0.461(f)(5).

⁵ *Chrysler v. Brown*, 441 U.S. 281, 292-94 (1979). *See also* discussion of the Trade Secrets Act at paras. 9-16 below.

⁶ *See Chrysler v. Brown*, 441 U.S. at 318. Executive Order No. 12,600 requires federal agencies to establish pre-disclosure procedures to allow submitters of certain information to object to its release. 3 C.F.R. 235 (1988). Section 0.459 of the Commission's rules, 47 C.F.R. § 0.459, describes the procedures for requesting that information be withheld from public inspection. This rule is further discussed at para. 19 below.

⁷ 5 U.S.C. § 552(b)(4).

⁸ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see also AT&T Information Systems, Inc. v. GSA*, 627 F.Supp. 1396, 1401 n.9 (D.D.C. 1986).

⁹ *Public Citizen Health Research Group*, 704 F.2d. at 1290; *see also Landfair v. U.S. Dep't of Army*, 645 F.Supp. 325, 327 (D.D.C. 1986) (commercial and financial information can include business sales statistics, research data, technical designs, overhead and operating

5. For many years, the applicable standard for whether commercial or financial information was "confidential" under Exemption 4 of FOIA was set forth in *National Parks and Conservation Association v. Morton*.¹⁰ In *National Parks*, the Court set forth a two-part test, stating that "[c]ommercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."¹¹ While "conclusory and generalized allegations" cannot support nondisclosure, neither is an elaborate economic analysis necessary to establish the likelihood of substantial competitive injury.¹²

6. In *Critical Mass Energy Project v. Nuclear Regulatory Commission*,¹³ the court revisited the definition of "confidential" set forth in *National Parks*. The court did not abandon the definition of "confidential" presented in *National Parks*, but chose to limit that definition's application to situations where a party *must* submit information to a federal agency.¹⁴ In contrast, under *Critical Mass*, "financial or commercial information provided to the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."¹⁵ Therefore, if commercial or financial information obtained from a person is submitted voluntarily and would not customarily be disclosed by the submitter, it is deemed confidential without requiring any examination of the competitive harm or governmental impairment portions of the *National Parks* test.¹⁶

costs, and information on financial condition); *International Satellite, Inc.*, 57 RR 2d 460 (1984) (information is commercial "if it relates to commerce" whether or not submitter is a for-profit entity).

¹⁰ 498 F.2d 765 (D.C. Cir. 1974).

¹¹ 498 F.2d at 770; see also, e.g., *Arvig Telephone Co.*, 3 FCC Rcd 3723, 3723-24 (Com. Car. Bur. 1988) (applying *National Parks*).

¹² *Public Citizen Health Research Group*, 704 F.2d at 1291; *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 680-81 (D.C. Cir 1976).

¹³ 975 F.2d 871 (D.C. Cir. 1992), cert. denied, __ U.S. __, 113 S.Ct. 1579 (1993).

¹⁴ 975 F.2d at 879 (D.C. Cir. 1992).

¹⁵ *Id.*

¹⁶ See, e.g., *Allnet Communication Services, Inc. v. F.C.C.*, 800 F.Supp. 984 (D.D.C. 1992) (applying *Critical Mass* to request by Allnet for cost information submitted to the FCC by other telecommunications companies in support of proposed changes in rates); see also *Lykes Bros. Steamship Co., Inc v. Pena*, No. 92-2780, slip op. at 8-11 (D.D.C. Sept 9,

7. In addition to *National Parks'* well-known, two-prong test, (*i.e.*, protecting from mandatory disclosure information likely either (i) to impair the Government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the submitter), *National Parks* also left open the possibility of a third prong that would protect other governmental interests, such as compliance and program effectiveness.¹⁷ *Critical Mass* embraced the view that the governmental and private interests identified in *National Parks'* two-prong test are not exclusive¹⁸ and other cases have recognized that Exemption 4 protects a governmental interest in the effectiveness of government programs.¹⁹

8. Finally, Exemption 4 protects commercial or financial information that is "privileged." Because the language of Exemption 4 applies to trade secrets and commercial or financial information that are "privileged or confidential," some courts have suggested that information may be privileged for purposes of Exemption 4, even if it is not confidential.²⁰ Other courts have recognized that Exemption 4 may incorporate certain privileges, while rejecting the claims of privilege specifically before them.²¹

2. The Trade Secrets Act and Commission Authority to Disclose Exemption 4 Records

9. While FOIA Exemption 4 allows an agency to withhold business competitive

1992) (submission required from one seeking benefits of voluntary program is considered mandatory for purposes of *Critical Mass*).

¹⁷ 498 F.2d at 770 n.17.

¹⁸ 975 F.2d at 879.

¹⁹ *Allnet Communication Services*, 800 F.Supp. at 990; *see also 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1, 10 (1st Cir. 1983) (test is whether disclosure of Exemption 4 material will harm an "identifiable private or governmental interest which the Congress sought to protect").

²⁰ *E.g.*, *Washington Post Co. v. HHS*, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982).

²¹ *Anderson v. HHS*, 907 F.2d 936, 945 (10th Cir. 1990) (recognizing that certain discovery privileges may constitute additional ground for non-disclosure under Exemption 4, but rejecting argument that trade secret for purposes of a state protective order is privileged for purposes of FOIA on the grounds that Exemption 4 sets the sole standard for determining what is a trade secret under that exemption); *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 400 (5th Cir.) (recognizing that Exemption 4 extends to privileges created by Constitution, statute or common law, but declining to hold that Exemption 4 incorporates a lender-borrower privilege), *cert. denied*, 471 U.S. 1137 (1985).

information from public disclosure, the Trade Secrets Act²² acts as an affirmative restraint on an agency's ability to release such information. The Trade Secrets Act provides criminal and employment penalties for federal officers or employees who disclose trade secrets, except in certain circumstances. It states:

Whoever, being an officer or employee of the United States or of any department or agency thereof, ... publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties ... [that] concerns or relates to the trade secrets, processes, operations, style of work, or apparatus ... shall be fined not more than \$1000, or imprisoned not more than one year, or both; and shall be removed from office or employment.²³

Notably, the sanctions supplied by the Trade Secrets Act do not apply where disclosure is "authorized by law."

10. In *Chrysler Corp. v. Brown*,²⁴ the Supreme Court held that a violation of the Trade Secrets Act would not only be a criminal offense, but would also constitute an abuse of agency discretion redressible under the Administrative Procedure Act through what is commonly referred to as a "reverse FOIA" action.²⁵ The Supreme Court there also discussed the relationship between the Trade Secrets Act and Exemption 4 as follows:

Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of [the Trade Secrets Act]. . . that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of [the Trade Secrets Act].²⁶

11. The United States Court of Appeals for the District of Columbia Circuit has described the relationship between the two statutes in more detail, holding that the Trade

²² 18 U.S.C. § 1905.

²³ 18 U.S.C. § 1905 (emphasis added).

²⁴ 441 U.S. 281 (1979).

²⁵ See 441 U.S. at 318; see also *Freedom Of Information Act Guide and Privacy Act Overview* (U.S. Dep't of Justice, September 1995 ed.) at 159. Under the Administrative Procedure Act, a court may review agency action to determine if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

²⁶ *Id.* at 319 n. 49.

Secrets Act is "at least coextensive with" Exemption 4 of FOIA.²⁷ Thus, if information may be withheld under Exemption 4, the agency is barred from disclosing it by the terms of the Trade Secrets Act unless the disclosure is otherwise authorized by law.²⁸ Conversely, to the extent the Trade Secrets Act is broader than Exemption 4 and information does not fall within the ambit of Exemption 4, FOIA itself would serve as the requisite authorization by law under the Trade Secrets Act to permit disclosure.²⁹

12. In *Chrysler Corp.*, the Court also made clear that an administrative regulation has the force of law for purposes of serving as the requisite "authorization by law" under the Trade Secrets Act to permit disclosure if the regulation (i) is substantive in that it affects individual rights and obligations, (ii) is rooted in a grant of power by Congress and (iii) was promulgated in conformance with any procedural requirements established by Congress, such as those found in the Administrative Procedure Act.³⁰ Sections 0.457(d)(1) and 0.457(d)(2)(i) of the Commission's rules constitute the requisite legal authorization for disclosure of competitively sensitive information under the Trade Secrets Act. These rules permit disclosure of trade secrets and commercial or financial information upon a "persuasive showing" of the reasons in favor of the information's release.³¹

13. In particular, Section 0.457(d)(1) provides that certain categories of materials listed therein, such as broadcasters' annual financial reports, are presumed not routinely available for public inspection and that "a persuasive showing as to the reasons for inspection" will be required for such material. Section 0.457(d)(2)(i) applies to materials not falling within the specific categories established by Section 0.457(d)(1) for which the Commission has granted a submitter's request that the information not be made routinely available. Section 0.457(d)(2)(i) thus provides that "[i]f it is shown in the request that the materials contain trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection"

14. Sections 0.457(d)(1) and 0.457(d)(2)(i) satisfy all three elements of the *Chrysler* test because the rules: (i) are substantive in that they affect the public's right to access records and the confidentiality rights of those submitting information to the

²⁷ *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151-52 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

²⁸ *Id.*

²⁹ *Id.* at 1152 n. 139.

³⁰ 441 U.S. at 301-303.

³¹ 47 C.F.R. §§ 0.457(d)(1), 0.457(d)(2)(i).

Commission, (ii) are authorized by Section 4(j) of the Communications Act,³² which provides that "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice," and (iii) were adopted according to the procedural requirements imposed on the FCC by Congress.³³ In *Northern Television v. FCC*,³⁴ the court concluded that the Commission's disclosure of broadcasters' annual financial reports was authorized by Section 0.457(d)(1) and accordingly that release was authorized by law and did not violate the Trade Secrets Act.³⁵

15. As indicated above, the Commission's legal authority to adopt a rule that permits disclosure of materials covered by the Trade Secrets Act is grounded in Section 4(j) of the Communications Act.³⁶ In *Federal Communications Commission v. Schreiber*,³⁷ the Supreme Court expressly addressed the Commission's authority under that Section, noting: "Grants of agency authority comparable in scope to § 4(j) [of the Communications Act] have been held to authorize public disclosure of information, or receipt of data in confidence, as the agency may determine to be proper upon a balancing of the public and private interests

³² 47 U.S.C. § 4(j).

³³ Sections 0.457(d)(1) and (d)(2)(i) were promulgated by the FCC in 1967 as a reenactment of a rule initially adopted by the Commission in 1945 following notice and comment. See *Amendment of Part 0, Rules and Regulations to Implement P.L. 89-487*, 8 FCC 2d 908, 924 (1967); 10 Fed. Reg. 9718 (1945); 9 Fed. Reg. 801 (1944) (notice of proposed rulemaking); see also *Northern Television v. FCC*, No. 79-3468, 1 Gov't Disclosure Serv (P-H) para. 80,124 (D.D.C. Apr. 18, 1980) (describing history of rule).

³⁴ No. 79-3468, 1 Gov't Disclosure Serv (P-H) para. 80,124 (D.D.C. Apr. 18, 1980).

³⁵ Although *Northern Television* applied to Section 0.457(d)(1) of our rules, Section 0.457(d)(2)(i) differs from Section 0.457(d)(1) only in that Section 0.457(d)(1) deals with categories of materials that are presumed not routinely available for public disclosure, while Section 0.457(d)(2) applies to materials not falling within those categories. Section 0.457(d)(2)(i) thus satisfies all the elements of the *Chrysler* test for precisely the same reasons as the *Northern Television* decision explains that Section 0.457(d)(1) meets the test. See generally, *Petition of Public Utilities Commission, State of Hawaii*, 10 FCC Rcd 2881, 2887 n.77 (Wireless Bur. 1995) (noting that Commission has authority to disclose Exemption 4 materials under authority of both § 0.457(d)(1) and § 0.457(d)(2)), *modified on other grounds*, 10 FCC Rcd. 3984 (1995).

³⁶ Section 4(j) of the Communications Act provides in relevant part: "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. 47 U.S.C. § 4(j).

³⁷ 381 U.S. 279 (1965).

involved."³⁸

16. Other provisions of the Communications Act may also authorize the release of materials governed by the Trade Secrets Act in particular circumstances. For example, Section 220(f) of the Communications Act³⁹ authorizes FCC employees, upon direction of the Commission, to disclose information gathered by the Commission while examining a carrier's books or accounts. As the Commission has written, "[Section 220(f)] is precisely the type of congressional authorization to disclose information which exempts disclosure from the strictures of the Trade Secrets Act." ⁴⁰

B. Review of Commission's Policies Governing Disclosure

1. Commission Rules and Procedures

17. The Commission adopted general rules to implement the provisions of the FOIA in 1967.⁴¹ Although the rules have been amended several times, they generally track the statutory language of the FOIA. Section 0.457(d) of the Commission's Rules implements FOIA Exemption 4. Quoting Exemption 4, it provides that records not routinely available for public inspection include "[t]rade secrets and commercial or financial information obtained from any person and privileged or confidential."⁴² Like the statute, the rule also states that under Exemption 4, "the Commission is authorized to withhold from public inspection materials which would be privileged . . . if retained by the person who submitted them." Finally, the rule permits the withholding of "materials which would not customarily be released to the public by [the person submitting them], whether or not such materials are protected from disclosure by a privilege."⁴³ In implementing this rule, however, the Commission generally relies not upon the precise language of the rule, but upon the statutory language of Exception 4 and the general case law construing it, discussed above.⁴⁴

³⁸ 381 U.S. at 291-92 (notes omitted).

³⁹ 47 U.S.C. § 220(f).

⁴⁰ *Amendment of Part O of the Commission's Rules with Respect to Delegation of Authority to the Chief, Common Carrier Bureau*, 104 F.C.C.2d 733, 737 (1986).

⁴¹ *Amendment of Part O, Rules and Regulations, to Implement P.L. 89-487*, 8 FCC 2d 908 (1967), codified as amended at 47 C.F.R. §§ 0.441-0.461.

⁴² 47 C.F.R. § 0.457(d).

⁴³ *Id.*

⁴⁴ See paras. 4-8 above.

18. Section 0.457 of the Commission's rules also provides that certain categories materials listed therein are deemed to be within Exemption 4 and therefore are "not routinely available for public inspection."⁴⁵ As indicated above,⁴⁶ such Exemption 4 materials may not be disclosed by Commission employees unless an appropriate request for inspection is made and, after weighing the considerations favoring disclosure and non-disclosure, the Commission determines that a "persuasive showing" has been made to warrant disclosure.⁴⁷

19. Any person submitting information or materials to the Commission not falling within the specific categories set forth in Section 0.457 may also request on an *ad hoc* basis that such information not be made routinely available for public inspection under Exemption 4.⁴⁸ Each such request must contain a statement of the reasons for withholding the materials from inspection and of the facts upon which those reasons are based.⁴⁹ A request that information not be made routinely available for public inspection will be granted if it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions

⁴⁵ The materials presumed not routinely available for public inspection are: (i) financial reports submitted by licensees of broadcast stations pursuant to 47 C.F.R. § 1.611, (ii) applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications, (iii) Schedules 2, 3, and 4 of financial reports submitted for cable television systems pursuant to 47 C.F.R. § 76.403, (iv) annual fee computation forms submitted for cable television systems pursuant to 47 C.F.R. § 76.406 and (v) certain materials submitted to the Commission prior to July 4, 1967 or with respect to equipment authorizations between July 4, 1967 and March 25, 1974. 47 C.F.R. § 0.457.

⁴⁶ See para. 13 above.

⁴⁷ 47 C.F.R. §§ 0.451(b)(5), 0.457(d)(1); 0.457(d)(2)(i); 0.461(f)(4).

⁴⁸ 47 C.F.R. § 0.459(a). In the absence of a request that materials not be routinely available for public inspection, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection. 47 C.F.R. § 0.457(d)(2)(i). Ordinarily, however, in the absence of such a request, materials which are submitted to the Commission will be made available for inspection upon request pursuant to Section 0.461, even though some question may be present as to whether they contain trade secrets or like matter. 47 C.F.R. § 0.457(d)(2)(i).

⁴⁹ 47 C.F.R. § 0.459(b). Requests which comply with these requirements are acted on by the appropriate Bureau or Office Chief. 47 C.F.R. § 0.459(d).

of FOIA.⁵⁰ If a request that materials not be routinely available for public inspection is granted, the material will be treated the same as those categories of information presumed not routinely available for public disclosure under Section 0.457(d) of the Commission's rules.⁵¹ That is, any person wishing to inspect such materials must submit a request for inspection (i.e., a FOIA request) under Section 0.461⁵² and a persuasive showing as to the reasons for inspection will be required.⁵³

20. The Commission's rules also contain procedures to protect the confidentiality of information until appeals procedures have been completed. Thus, if a request for confidentiality is denied, the person who submitted the request may, within 5 working days, file an application for review by the Commission.⁵⁴ If the application for review is denied, the person who submitted the request will be afforded 5 working days in which to seek a judicial stay of the ruling.⁵⁵ In the interim, the material will not be disclosed. Similar provisions govern in instances in which the records in question are the subject of a FOIA request. That is, even if the Commission determines that the information must be disclosed pursuant to FOIA, the information will not be disclosed until the person requesting confidentiality has had an opportunity to pursue administrative and judicial appeals.⁵⁶

2. General Policies Regarding Disclosure of Exemption 4 Records

21. As indicated above, the Commission's rules provide for the disclosure of Exemption 4 material if a "persuasive showing is made."⁵⁷ Consistent with the Supreme Court's decision in *FCC v. Schreiber*, discussed above, the rules also contemplate that the Commission will engage in a balancing of the public and private interests favoring disclosure

⁵⁰ 47 C.F.R. § 0.459(d). Prior to a regulatory amendment in 1984, the Commission required clear and convincing evidence to justify release of materials not routinely available for public inspection. See *Amendment of Commission's Rules Regarding Confidential Treatment of Information Submitted to Commission*, 98 FCC 2d 1, 3-5 (1984).

⁵¹ 47 C.F.R. § 0.459(h).

⁵² *Id.*

⁵³ 47 C.F.R. § 0.457(d)(1).

⁵⁴ 47 C.F.R. § 0.459(g).

⁵⁵ *Id.*

⁵⁶ 47 C.F.R. § 0.461(h).

⁵⁷ See paras. 13, 18 above.

and non-disclosure.⁵⁸ The Commission generally has exercised its discretion to release FOIA Exemption 4 information only in very limited circumstances such as where a party placed its financial condition at issue in a Commission proceeding or where the Commission has identified a compelling public interest in disclosure.⁵⁹

22. An example of a matter in which a party placed its financial condition at issue in a Commission proceeding is *Kannapolis Television Company*.⁶⁰ In that case, the Commission granted partial disclosure of the Annual Financial Reports filed by WCCB-TV, Inc. WCCB had filed a petition to deny Kannapolis's applications for a construction permit and for subscription television authorization, claiming that grant of the applications would impair WCCB's ability to compete effectively and would also jeopardize WCCB's financial viability. Kannapolis sought access to certain Annual Financial Reports filed by WCCB so that it could assess WCCB's claims. The parties agreed, and the Commission found, pursuant to Commission precedent, that by placing its financial condition at issue, release of some of WCCB's financial reports was required.⁶¹ In determining which of the financial reports to release publicly, the Commission stated that it considered "the relevancy and materiality of the information sought and the inability to obtain the requested information from other sources."⁶²

23. *MCI Telecommunications Corporation*⁶³ illustrates a second type of circumstance under which discretionary release of competitively sensitive information has been permitted under the Commission's FOIA decisions, i.e., where a compelling public interest exists in disclosure. In that proceeding, MCI had requested access to certain agreements filed by AT&T and a number of regional bell holding companies relating to shared network facilities. Although the Commission found that the information contained in the agreements was exempt from mandatory disclosure under the FOIA because its release could have injured AT&T competitively, it found nonetheless that MCI had presented public interest concerns warranting release. MCI had argued that, through the subject agreements, AT&T had obtained facilities for transport of "access-like" services at rates substantially

⁵⁸ See 381 U.S. at 291-292.

⁵⁹ See *The Western Union Telegraph Company*, 2 FCC Rcd 4485, 4487 (1987) (citing *Kannapolis Television Co.*, 80 FCC 2d 307 (1980)).

⁶⁰ 80 F.C.C.2d 307 (1980); see also, e.g., *Leflore Broadcasting Company*, 36 FCC 2d 101, 103 (1972) (release of Annual Financial Reports authorized because "poor financial position" had been claimed).

⁶¹ 80 FCC 2d at 308-309.

⁶² *Id.* at 310.

⁶³ 58 RR 2d 187 (1985).

lower than those which MCI and other interexchange carriers could obtain under special access tariffs, and that such preferences called into question the reasonableness of AT&T's private line tariffs (which were based in part on rates paid for such "access like" services). The Commission concluded that MCI needed the information in order to press its claims in ongoing proceedings considering special access tariffs, and ordered release for this limited purpose.⁶⁴

24. Even where a party has placed its financial condition at issue or a compelling public interests exists to disclose confidential information, however, the Commission does not automatically authorize release of such information.⁶⁵ In determining whether a public interest in the privacy of proprietary business data exists, the Commission has adhered to a policy whereby it "will not authorize the disclosure of confidential financial information on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue."⁶⁶ In other

⁶⁴ *Id.* at 189-190; see also *Rogers Radiocall*, 52 RR 2d 1373 (1982) (describing unappealed Common Carrier Bureau decision that release of estimation of customer levels in 35 cities in which AT&T subsidiary had applied to offer domestic cellular radio service would be in the public interest as deletion of this estimation would cause application to be deficient and withholding estimation would deprive commenters from evaluating this aspect of the application); *National Exchange Carrier Assoc., Inc.*, 5 FCC Rcd 7184, 7185 (1990) (finding public interest in disclosure of audit report pertaining to adjustments by four Bell Operating Companies to the NECA common line pool where no information related to individual products or services and ratepayers had vital interest in outcome of show cause/forfeiture proceeding).

⁶⁵ *Hubbard Broadcasting, Inc.*, 46 RR 2d 1261, 1264 (1979) (where released financial data already demonstrates losses, it is not necessary to disclose additional data to pinpoint causes of losses); *Newport TV Cable Co., Inc.*, 55 FCC 2d 805, 806 (1975) (where released balance sheets already demonstrate profits, it is not necessary to disclose additional data to prove profitability).

⁶⁶ *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978) (citing *Sioux Empire Broadcasting Company*, 10 FCC 2d 132 (1967)); accord *Cincinnati Bell Telephone Co. Tariff* ("Cincinnati"), 10 FCC Rcd 10574 (Com. Car. Bur. 1995) (citing *Classical Radio*); see also *Petition of Public Utility Commission, State of Hawaii*, 10 FCC Rcd 2881, 2888 (Wireless Bur. 1995) (information must be directly relevant to a required determination), modified on other grounds 10 FCC Rcd. 3984 (Wireless Bur. 1995); *American Telephone and Telegraph Co.*, 5 FCC Rcd 2464 (1990) (quoting Letter of Chief Common Carrier Bureau (Nov. 23, 1988) distinguishing between material of "critical significance" and data providing a "factual context" for the consideration of broad policy issues and concluding with respect to the latter the prospect of competitive harm likely to flow from release outweighs value of making information available).

words, the Commission requires that "specific and concrete public benefits be reasonably anticipated before properly exempt information will be released on a discretionary basis."⁶⁷

3. The Protective Order Approach

25. In recent years, the Commission also has increasingly relied on special remedies such as redaction,⁶⁸ aggregated data or summaries,⁶⁹ and protective orders⁷⁰ to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials. In particular, the Commission has refined the manner in which it releases confidential information by relying more frequently on protective orders or agreements. Protective orders or agreements essentially require parties to whom confidential information is made available to limit the persons who will have access to the information and the purposes for which the information will be used.

26. As two recent Bureau orders have recently noted with respect to competitively sensitive information: "even when information is critical to resolution of a public interest issue, the competitive threat posed by widespread disclosure under the FOIA may outweigh

⁶⁷ *The Western Union Telegraph Co.*, 2 FCC Rcd at 4487.

⁶⁸ *Allnet Communications Services, Inc.*, 8 FCC Rcd 5629, 5630 (1993) (withholding from public release some redacted material provided to the parties under a protective order, but releasing other redacted material that did not contain confidential information).

⁶⁹ *Id.* (finding certain averaged data not to be competitively sensitive); *Bellsouth Corp.*, 8 FCC Rcd 8129, 8130 (1993) (releasing summary of audit findings despite claim of confidentiality since summary nature of information significantly diminished the likelihood of competitive harm).

⁷⁰ See, e.g., *Cincinnati*, 10 FCC Rcd 10574; *Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii ("Hawaii")*, 10 FCC Rcd 2359 and 10 FCC Rcd 2881 (Wireless Bur. 1995); *In re Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, 9 FCC Rcd 2610 (Com. Car. Bur. 1994); *Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs ("Open Network Architecture")*, 7 FCC Rcd 1526 (Com. Car. Bur. 1992), *aff'd*, 9 FCC Rcd 180 (1993); *Motorola Satellite Communications, Inc. Request for Pioneer's Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band ("Motorola")*, 7 FCC Rcd 5062 (1992).

the public benefit in disclosure."⁷¹ In such instances, disclosure under a protective order or agreement may serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure for a specific public purpose.⁷²

27. For example, in the context of the Shared Network Facilities Arrangement (SNFA) investigation, the Commission determined that inter-carrier SNFA contracts to which MCI sought access, although exempt from mandatory disclosure under FOIA Exemption 4, were relevant to MCI's claims that AT&T had obtained facilities for transport of "access-like" services at rates substantially lower than those which MCI and other interexchange carriers, and that such preferences called into question the reasonableness of AT&T's private line tariffs.⁷³ The Commission therefore allowed MCI to have access to the documents, but it directed the Office of General Counsel to impose a protective order that would prevent MCI, the party seeking access to confidential SNFA materials, from revealing that information to third parties or using it for competitive purposes.⁷⁴

28. Likewise, in proceedings to consider petitions by various states seeking to continue to regulate the intrastate rates of commercial mobile radio services, the Wireless Telecommunications Bureau found that certain carrier financial information submitted by California was sufficiently relevant to disposition of California's petition that it could not be excluded from consideration of the issues on the merits. The Bureau found that excluding the information would in effect deny California the opportunity to make the demonstration, required by Congress, that it should be allowed to regulate intrastate rates. The Bureau found that it was therefore desirable to allow the public to comment on the data. Unlimited disclosure was not appropriate, however, due to the potential for competitive injury. Accordingly, the Bureau ordered limited disclosure of the data, pursuant to a protective order.⁷⁵

29. While protective orders permit the Commission to make confidential information available on a limited basis while minimizing the competitive harm that might ensue from widespread disclosure, the Commission is mindful of the fact that extensive

⁷¹ *Cincinnati*, 10 FCC Rcd at 10575; *Hawaii*, 10 FCC Rcd at 2366; see also *Open Network Architecture*, 7 FCC Rcd at 1533 (citing *Penzoil Co. v. FPC*, 534 F.2d 627, 631-32 (5th Cir. 1976), for the proposition that in considering discretionary disclosure of Exemption 4 material, agencies must consider whether less extensive disclosure may provide the public with adequate knowledge while protecting proprietary information).

⁷² *Cincinnati*, 10 FCC Rcd at 10575; *Hawaii*, 10 FCC Rcd at 2366 (footnotes omitted).

⁷³ *MCI Telecommunications Corp.*, 58 RR 2d 187, 190 (1985).

⁷⁴ *Id.*

⁷⁵ *Hawaii*, 10 FCC Rcd at 2367.

reliance on protective orders may also impose burdens on the public and the Commission. For example, the Commission's Office of Engineering and Technology stated that to reflexively grant limited disclosure of confidential information under protective orders as a "routine matter" in pioneer preference proceedings⁷⁶ "would result in significant new burdens upon our staff and delay completion of such proceedings"⁷⁷

III. ISSUES FOR COMMENT

A. General Issues

30. The Commission's policies implementing its rules governing confidentiality affect both the competitive nature of the telecommunications industry and performance of the Commission's public responsibilities. As indicated in the preceding discussion, the Commission has long been sensitive to the concern that fulfillment of its regulatory responsibilities does not result in unnecessary disclosure of confidential information that places Commission regulatees at an unfair competitive disadvantage. In that respect, we recognize that the "private" interests of regulatees in ensuring their own competitive vitality generally coincide with the public interest in promoting a robust and competitive telecommunications market. Further, allowing confidential submission increases the willingness of holders of confidential information to provide that information to the Commission and, even where submission is mandatory, often avoids the burden and delay of invoking such mandatory means.⁷⁸ For these reasons, the Commission's policy has been to avoid disclosures of confidential information except where necessary to the effective performance of its regulatory duties and to employ protective orders where appropriate.

31. At the same time, allowing confidential submission necessarily decreases the amount of information publicly available to facilitate public participation in the regulatory process. Public participation in Commission proceedings cannot be effective unless meaningful information is made available to the interested persons. As noted, in recent years, the Commission also has relied more frequently on protective orders and agreements. Protective orders and agreements have the advantage of permitting the release -- albeit on a limited basis -- of more information than would be possible without them, given our obligations to protect trade secrets and commercial or financial information. On the other

⁷⁶ A pioneer's preference allows a party demonstrating that it has developed an innovative proposal leading to establishment of a spectrum-based service not currently provided, or substantial enhancement of an existing spectrum-based service, to be considered for a construction permit or license for the service free from any mutually exclusive applications. See 47 C.F.R. § 1.402.

⁷⁷ *Motorola Satellite Communications Inc.*, 7 FCC Rcd 5062, 5064 (1992) (quoting Letter of Thomas P Stanley, Chief Engineer (June 3, 1992)).

⁷⁸ See, e.g., *Probe Research, Inc.*, 50 RR 2d 351, 353 (1981).

hand, protective orders are inconvenient and sometimes cumbersome and increase the administrative burdens on the Commission and those subject to them. In addition, protective orders may make it less likely that the Commission will receive a diversity of public comment on the protected materials. Given the Commission's obligation to balance these concerns, we therefore seek comment whether the Commission should adopt additional policies or rules governing the treatment of information submitted to the Commission in confidence.

32. Specifically, we seek comment on the standard in the Commission's current rules that permits disclosure of trade secrets and confidential commercial or financial information upon a "persuasive showing" of the reasons in favor of the information's release.⁷⁹ We ask commenters to address whether this continues to be the appropriate standard or whether the Commission should adopt some other standard. Assuming we retain this standard, we seek comment on what should constitute a "persuasive showing" of the reasons in favor of the information's release. As discussed in more detail below, we also ask comment on standards that should apply in particular types of Commission proceedings.

33. We also seek comment on whether the Commission's current approach to the use of protective orders is the appropriate approach or whether the Commission should adopt some other approach. Advantages and disadvantages of the current approach should be discussed. We specifically request comment on any problems or burdens that commenters perceive with the current protective order approach and ways in which these problems or burdens might be minimized. Commenters should also address whether the Commission's willingness to release confidential information subject to a protective order reduces submitters willingness to voluntarily submit information to the Commission. And, we seek comment on whether the use of protective orders unduly interferes with the Commission's ability to obtain public comment or with the public's right to know what actions the Commission is taking and why it is taking them.

34. As a related matter, we note that a recent D.C. Circuit opinion suggests that the Commission may have the option of releasing all or part of an order under seal.⁸⁰ We seek comment whether it is appropriate for the Commission to draft a decision that relies on confidential data (or data disclosed pursuant to protective order) without publicly revealing the information.⁸¹ If the Commission determines that the data is necessary to support the order, should the Commission place the relevant order under seal or should the information lose protected status at this point?

⁷⁹ See 47 C.F.R. § 0.457(d)(1), (d)(2)(i).

⁸⁰ *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1492 (D.C. Cir. 1995).

⁸¹ See also para. 41. below.

35. Commenters also are invited to address and comment on any other issues relating to the Commission's policies and rules governing confidential treatment of information submitted to the Commission.

B. Model Protective Order

36. As discussed, release of confidential information under a protective order or agreement can often serve to resolve the conflict between safeguarding competitively sensitive information and allowing interested parties the opportunity to fully respond to assertions put forth by the submitter of confidential information. We seek comment as to whether it would be helpful for the Commission to develop a standard form protective order that could then be modified as appropriate to fit the circumstances of particular cases. We have supplied, as Appendix A to this Notice, a draft model protective order. We look forward to receiving comments on this draft order, and in particular what modifications need to be made to make it suitable to the varied types of Commission proceedings in which issues of confidentiality arise.

37. We also seek comment on what procedures the Commission should use to resolve disputes about the issuance and content of protective orders and how to ensure compliance with them. We are especially interested in whether commenters believe that our rules should be amended to address such issues directly.

C. Issues That Arise With Respect to Specific Types of FCC Proceedings

38. As indicated above, we also seek comment on whether different standards should apply for various categories of proceedings with respect to (i) what constitutes a "persuasive showing" of the reasons in favor of confidential information's release and (ii) what, if any, protective conditions we should place upon released material and whether this should vary depending on the nature of a proceeding. Specifically, we seek comment on whether the Commission should apply different disclosure policies to rulemakings, licensing proceedings, tariff proceedings and perhaps other categories of proceedings. For example, we seek comment on whether the Commission should require public disclosure of information without protective orders in some types of Commission proceedings even though that information is within FOIA Exemption 4. Specific issues that arise in connection with various types of proceedings are discussed below. In addition, we request comments on whether special disclosure policies should apply to other categories of proceedings, not specifically mentioned below, and, if so, what those procedures should be.

1. Title III Licensing proceedings

39. Section 309 of the Communications Act provides that the Commission must allow at least 30 days following issuance of a public notice of certain radio license

applications for interested parties to file petitions to deny an application.⁸² Section 309 thus contemplates that interested members of the public will have a full opportunity to challenge the grant of license applications. In addition, relevant case law indicates generally that petitioners to deny must be afforded access to all information submitted by licensees that bear upon their applications.⁸³

40. We seek comment on whether the fact that the statutory scheme expressly contemplates public participation in Title III license application proceedings makes it inappropriate to withhold information filed in such proceedings from routine public disclosure. In this regard, we note that Commission rules currently specify that broadcast and other Title III license applications are routinely available for public inspection.⁸⁴ Nevertheless, applicants do sometimes request confidential treatment pursuant to Section 0.459 of our rules for information submitted with their applications in both contested and uncontested application proceedings. In light of the special issues regarding public participation that arise in Section 309 proceedings, we therefore seek comment on whether our general policy should be to discourage submission of confidential information in the application context but still to leave the Commission some discretion to use protective orders where it seems warranted. Or, is it appropriate to adopt a general policy with regard to licensing proceedings, permitting disclosure of trade secrets and commercial or financial information only pursuant to protective orders?

41. If the Commission were to adopt a policy favoring the use of protective orders in licensing proceedings, we assume that petitioners would be given an opportunity to supplement their petitions to deny after reviewing the protected material. We also seek comment on whether members of the public should be afforded access to such protected material (pursuant to protective orders) in order to enable them to determine whether they wish to file petitions to deny. Would such policies tend to unduly delay Commission action

⁸² 47 U.S.C. § 309(b), (d)(1).

⁸³ See, e.g., *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) (en banc) (although Commission need not allow discovery on EEO claim in license renewal case, the full report of the Commission's investigation, including all evidence it receives, must be placed in the public record, and a stated reasonable time allowed for response by petitioners); see also *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 6053, 6054 (1987) (applicability of ex parte rules to information submitted in connection with Commission investigation of license applications), amended, 3 FCC Rcd 3995 (1988).

⁸⁴ See 47 C.F.R. §§ 0.453, 0.455.

on license applications?⁸⁵ We also seek comment on whether it is ever appropriate to withhold from release entirely some Exemption 4 information, as has sometimes been done in the context of licensing proceedings⁸⁶ and if so what standard should be used. Finally, we seek comment on whether different policies apply to different categories of material. For example, commenters should address whether our policy would be to use protective orders in licensing proceedings only in instances in which the material in question satisfies the trade secrets or "substantial competitive harm" prongs of Exemption 4 and to require public disclosure in all other cases in which the Exemption is invoked.

2. Tariff proceedings

42. Section 203 of the Communications Act requires that common carriers file and maintain tariffs with the Commission. Section 204 gives the Commission the authority to review tariffs for lawfulness, which involves, among other things, a determination of whether the tariff is just and reasonable pursuant to Section 201(b) and is not unjustly discriminatory pursuant to Section 202 of the Act. The Commission has adopted rules specifying what support materials carriers must file to enable it to carry out its tariff review authority. Section 61.38 of the Commission's rules requires that a dominant carrier filing a letter of transmittal proposing to change its rates, offer a new service or change the terms and conditions under which an existing service is offered must include certain cost support data.⁸⁷ Section 61.49 of the Commission's rules contains a list of the support information that must be filed by carriers subject to price cap regulation.⁸⁸ Pursuant to Section 0.455(b)(11) of the Commission's rules, cost support data are routinely available for public inspection.⁸⁹

⁸⁵ See generally *Motorola Satellite Communications, Inc. Request for Pioneer's Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band*, 7 FCC Rcd 5062, 5064 n.7 (1992) (noting that OET had declined to grant confidentiality requests and to issue protective orders as a routine matter in pioneer preference proceedings because use of protective orders tends to delay completion of proceedings)

⁸⁶ See e.g., *Application of Mobile Communications Holdings, Inc. for Authority to Construct the ELLIPSO Elliptical Orbit Mobile Satellite System*, 10 FCC Rcd 1547, 1548 (Int'l Bur. 1994) (declining to release, even under protective order, detailed cost and pricing information of applicant for a license).

⁸⁷ 47 C.F.R. § 61.38.

⁸⁸ 47 C.F.R. § 61.49.

⁸⁹ 47 C.F.R. §§ 0.455(b)(11).

43. The Commission has generally made tariff support material publicly available.⁹⁰ It has departed from this policy only in a few limited circumstances, for example, to protect third-party vendor data where the data were made available subject to a protective agreement.⁹¹ Recently, a number of carriers have filed requests for confidential treatment of their cost support data with their tariff transmittals.⁹² This presents a number of problems during the tariff review process. The maximum period for tariff review is defined by statute. Specifically, the tariff review process is initiated by the filing of a letter of transmittal by a carrier proposing a change to the carrier's tariff. The Commission's rules afford interested parties an opportunity to file an opposition to the transmittal, which may take the form of a petition to reject and/or to suspend and investigate.⁹³ The filing carrier may file a reply.⁹⁴ Under the Communications Act, the Commission has a maximum of one hundred and twenty days to determine the lawfulness of the tariff transmittal.⁹⁵ The tariff goes into effect on its effective date unless the Commission issues an order rejecting or suspending and investigating the tariff.⁹⁶ Section 402(b) of the Telecommunications Act of 1996 provides that, effective one year after enactment, a local exchange carrier may file charges, classifications, regulations or practices on a streamlined basis, which shall be

⁹⁰ *Cincinnati*, 10 FCC Rcd at 10575 (citing *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n. 4 (1978)).

⁹¹ See paras. 27-28, above; *Letter from Kathleen M.H. Wallman to Jonathan E. Canis, et al.*, FOIA Control Nos. 94-310, 325, 328, 9 FCC Rcd 6495 (1994) (denying unrestricted access to cost support data filed in connection with virtual collocation tariff, but allowing access pursuant to protective order), *application for review pending*; see also *Cincinnati*, 10 FCC Rcd at 10575 (restating adherence to history of allowing open tariff proceedings, but allowing protection where cost data disaggregated and with potential of revealing market plans and positions in access services market); *MCI Telecommunications Corporation*, 58 RR 2d 187, 190 (1985) (allowing MCI access under protective agreement to certain agreements filed by AT&T where MCI argued that, through the agreements, AT&T had obtained facilities for transport of "access-like" services at rates substantially lower than those which MCI and other interexchange carriers could obtain under special access tariffs, and that such preferences called into question the reasonableness of AT&T's private line tariffs).

⁹² See Ameritech Transmittal No. 863, filed February 10, 1995; Southwestern Bell Telephone Company Transmittal No. 2470, filed June 16, 1995; Southwestern Bell Telephone Company Transmittal No. 2438, filed March 10, 1995.

⁹³ 47 C.F.R. § 1.773.

⁹⁴ *Id.*

⁹⁵ See 47 U.S.C. § 203(b)(2); 47 C.F.R. § 61.58(a)(2).

⁹⁶ 47 U.S.C. § 204.

effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which they are filed unless the Commission takes action before the end of the period.

44. A request for confidential treatment may not be resolved within the 120 day statutory time frame established for the tariff review process under current law, especially if a ruling is appealed. A request for confidentiality is unlikely to be resolved under the 7 or 15 day time frame that is to become effective for streamlined local exchange carrier filings under the Telecommunications Act of 1996. We therefore seek comment on how to resolve a request for confidentiality made in the context of the tariff review process. One possibility that takes account of the statutory time frame for the tariff review process is to require that carriers file any confidential information first, independent of the filing of the tariff transmittal. Under this alternative, the tariff filing could not be made until the request for confidentiality was resolved. Commenters should also address whether we should continue to make exceptions to the Commission's rule requiring such data to be made publicly available. In this regard, we seek comment on how petitioners will be able to formulate meaningful objections to the proposed tariff rates, terms and conditions, often a critical part of the tariff review process, if they are unable to review all support material prior to the date that petitions are due. One possible solution is to develop a generic protective agreement that parties can use to protect the information during the tariff review process.

45. Commenters also should address whether different disclosure policies should apply to different phases of the tariff review process. Specifically, should different disclosure policies be applied to the tariff review and tariff investigation stages? Actions denying petitions to suspend or reject tariffs, thereby allowing a tariff to go into effect, are considered non-final, non-judicially reviewable actions because a party can seek further redress by filing a formal complaint pursuant to Section 208 of the Act. In contrast, a tariff set for investigation is assigned a docket number and a pleading cycle is established providing for direct cases, comments and replies. At the conclusion of the investigation, the Commission issues an order which is subject to judicial review. Therefore since decisions to allow tariffs to go into effect are non-reviewable, non-final orders, should the Commission's policies focus on the need for disclosure to petitioners (whether or not pursuant to protective orders) primarily in instances in which a particular tariff has been set for investigation?

3. Rulemaking proceedings

46. Section 553(b) of the Administrative Procedure Act⁹⁷ (APA) generally requires notice and an opportunity to comment before promulgation of a final agency rule. Specifically, the APA requires that a rulemaking notice include, among other things, "either the terms or substance of the proposed rule or a description of the subjects and issues

⁹⁷ 5 U.S.C. § 551 *et seq.*

involved."⁹⁸ Further, after the required rulemaking notice has been provided, the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and "after consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."⁹⁹

47. An agency's decision to withhold information in the context of a rulemaking can have a significant impact on whether meaningful notice and opportunity to comment on the bases of an agency's decision have been given. In addition, issues arise to the extent that an agency relies on information that has not been made available to commenters.¹⁰⁰ For these reasons, the Commission generally has not afforded confidential treatment to material submitted in rulemakings, although it has on rare occasions utilized protective orders or agreements in the context of rulemakings. For example, in the *Review of Prime Time Access Rule*, the Commission allowed the examination, but not the copying of data based on Arbitron ratings reports and NAB/BCFM financial reports.¹⁰¹ Rulemakings also may create special problems for use of protective orders, however, because a large number of commenters may be involved. On the other hand, a blanket refusal to apply protective orders in the context of rulemakings might cause the Commission to have access to less information than if it used protective orders. We seek comment on these issues as well as the general issue of whether it is ever appropriate to withhold competitively sensitive information filed in rulemaking proceedings from routine public disclosure. We note that the Commission has the option of refusing to consider information in a rulemaking that is submitted along with a request for confidentiality.

4. Requests for Special Relief and Waivers

48. Parties affected by our rules have the right to seek special relief from the rules' scope or waiver of these rules. In certain cases, parties may base their request for relief upon---or other-wise put into issue---information that is confidential. This information

⁹⁸ 5 U.S.C. § 553(b).

⁹⁹ 5 U.S.C. § 553(c).

¹⁰⁰ *Abbot Laboratories v. Young*, 691 F.Supp. 462, 467 (D.D.C. 1988) (one purpose of the requirement that agencies disclose the documents it deems relevant to a proceeding is to ensure that interested parties have a meaningful opportunity to participate in the proceeding), *remanded on other grounds*, 920 F.2d 984 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 819 (1991); *see also e.g., Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii ("Hawaii")*, 10 FCC Rcd 2881, 2884 (Wireless Bur. 1995).

¹⁰¹ *See Letter from Independent Television to Roy Stewart*, MM Docket 94-123, March 28, 1995.

may include financial information explaining cash flow, profitability, or bankruptcy problems, or corporate or partnership structure designed to demonstrate insulation from control or interest. For example, in various cable television special relief proceedings, a party may seek relief based on severe financial difficulties, or upon corporate or partnership structure and insulation from control.¹⁰² Likewise, for example, a party may ask the Commission's Office of Engineering and Technology ("OET") to waive a technical standard applicable to industrial, scientific or medical equipment and submit commercially sensitive information about the design of or marketing plans for the equipment in support of the request.¹⁰³ We seek comment on whether and under what circumstances it is appropriate to withhold information filed in such proceedings from routine public disclosure, particularly when the information is potentially decisional to a point placed in issue by the party seeking to withhold such information and may have precedential value for future cases.

5. Formal Complaints

49. Section 208 of the Communications Act permits any party to bring before the Commission a complaint against a common carrier for acts or omissions in violation of either the Act or a Commission rule or order.¹⁰⁴ Our rules, in turn, establish both informal and formal procedures for handling such complaints.¹⁰⁵ Confidentiality issues frequently arise in formal complaint proceedings, especially in connection with discovery. Parties often use protective agreements to ensure the confidentiality of materials provided pursuant to discovery, and, in 1993, we amended our formal complaint regulations to include limitations on the manner in which an opposing party may use, duplicate, and disseminate materials that are obtained through discovery and deemed proprietary by the submitter.¹⁰⁶ While discovered materials are not routinely filed with the Commission, parties may be directed to submit particular documents that the staff determines to be decisionally significant. In addition, parties may describe or include excerpts of materials that are subject to protective agreements in briefs or other pleadings filed in formal complaint cases. Thus, even when

¹⁰² See generally 47 C.F.R. § 76.7(a) (cable petitions for special relief).

¹⁰³ See generally 47 U.S.C. §§ 18.101- 18.31.

¹⁰⁴ 47 U.S.C. § 208.

¹⁰⁵ 47 C.F.R. § 1.711 *et seq.* An informal complaint may be lodged simply by forwarding to the Commission a brief letter explaining the dispute between a complainant and the carrier. Formal complaints, however, are intended to provide an alternative to litigation in federal district court and are subject to various substantive and procedural requirements. 47 C.F.R. §§ 1.720-1.735.

¹⁰⁶ 47 C.F.R. § 1.731; see *Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 8 FCC Rcd 2614, 2621-22 (1993).